Dato' Seri Dr Kok Mew Soon & Ors v Mustapha bin Mohamed & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–849 OF 2007
GOPAL SRI RAM, ABDULL HAMID EMBONG AND HELILIAH JJCA
19 FEBRUARY 2008

Civil Procedure — Injunction — Interlocutory injunction — Application to restrain receivers and managers appointed by Danaharta — Whether offended s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998

Companies and Corporations — Receivership — Appointment of receivers and managers — Appointment by Danaharta — Application for injunction to restrain receivers and managers — Whether offended s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998

This appeal was directed against the order of the High Court dismissing the appellants' application for an interlocutory injunction restraining the receivers and managers appointed by Pengurusan Danaharta Nasional Berhad ('Danaharta'), the third respondent in this appeal. It had already been decided that s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act') is constitutional and bars the grant of injunctions against Danaharta (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257) and that it excludes judicial review (see *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal* [2007] 5 MLJ 125). The only issue in this appeal was whether the grant of an injunction against the receivers and managers appointed by Danaharta offended s 72 of the Act.

Held, dismissing the appeal:

(1) It was implicit that the court had already held in *Marina Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed)* [2008] 1 MLJ 317 that an injunction granted against a receiver and manager would indirectly contravene s 72 of the Act. The court was therefore bound by its own decisions (see para 6); *Hendry v De Cruz* [1949] MLJ Supp 25 referred.

(2) The UK cases referred to set out the position of a receiver and manager at English common law based on the equipollent UK Companies legislation. But the law in this country may not be the same because of s 192(2) of the Companies Act 1965. The subsection obviously creates a remedy that does not exist in common law. Thus, the appellants' contention that they would be bereft of any remedy if the injunction sought was not granted was not the case because if the receiver and manager was guilty of misconduct, an application could be made to move the court under s 192(2) for the appropriate relief (see paras 7–10).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap perintah Mahkamah Tinggi yang menolak permohonan perayu untuk injunksi interlokutari menghalang penerima dan pengurus yang dilantik oleh Pengurusan Danaharta Nasional Berhad (Danaharta), responden ketiga di dalam rayuan ini. Ia telah diputuskan bahawa s 72 Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta tersebut') adalah berperlembagaan dan menghalang pemberian injunksi terhadap Danaharta (lihat *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257) dan ia mengecualikan semakan kehakiman (lihat *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal* [2007] 5 MLJ 125). Satu-satunya isu di dalam kes ini adalah sama ada pemberian injunksi terhadap penerima dan pengurus yang dilantik oleh Danaharta melanggar s 72 Akta tersebut.

Diputuskan, menolak rayuan:

(1) Adalah tersirat bahawa mahkamah telah memutuskan di dalam kes *Marina Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed)* [2008] 1 MLJ 317 bahawa injunksi yang diberikan terhadap penerima dan pengurus akan secara tidak langsung memungkiri s 72 Akta tersebut. Mahkamah oleh itu terikat dengan keputusannya sendiri (lihat perenggan 5); *Hendry v De Cruz* [1949] MLJ Supp 25 dirujuk.

(2) Kes-kes UK yang dirujuk menggariskan kedudukan penerima dan pengurus dari segi *common law* berdasarkan perundangan syarikat UK yang sama. Tetapi undang-undang di negara ini tidak sama disebabkan s 192(2) Akta Syarikat 1965. Subseksyen tersebut jelas membentuk remedi yang tidak wujud di dalam *common law*. Oleh itu, hujahan perayu bahawa mereka akan kehilangan apa-apa remedi jika injunksi yang dipohon tidak diberi tidak menjadi isu kerana jika penerima dan pengurus bersalah kerana salah laku, permohonan boleh dibuat untuk

A mendapatkan perintah mahkamah di bawah s 192(2) untuk relief yang sewajarnya (lihat perenggan 7–10).]

Notes

For cases on appointment of receivers and managers, see 3(1) *Mallal's Digest* B (4th Ed, 2006 Reissue) paras 626–629.

For cases on interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2860–2862.

Cases referred to

C *B Johnson & Co (Builders) Ltd, Re* [1955] 2 All ER 775 (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257 (refd)

Gomba Holdings UK Ltd & Ors v Minories Finance Ltd & Ors [1989] 1 All ER 261 (refd)

D *Hendry v De Cruz* [1949] MLJ Supp 25 (refd)

Marina Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed) [2008] 1 MLJ 317 (folld)

Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal [2007] 5 MLJ 125 (refd)

E *Silven Properties Ltd v Royal Bank of Scotland Plc* [2004] 4 All ER 484 (refd)

Legislation referred to

Companies Act 1965 s 192(2)

Pengurusan Danaharta Nasional Berhad Act 1998 s 72

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Appeal from: Suit No 22–100 of 2007 (High Court, Kuantan)

Malik Imtiaz Sarwar (Gabriel Daniel and Ang Kok Chun with him) (Paul Ong & Associates) for the appellants.

G *V Vijakumar (Albar & Partners) for the first and second respondents.*

Tommy Thomas (Tommy Thomas) for the third respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

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[1] This is the judgment of the court.

[2] This appeal is directed against the order of the Kuantan High Court dismissing the appellants' application for an interlocutory injunction I restraining the receivers and managers appointed by Pengurusan Danaharta Nasional Berhad ('Danaharta'), the third respondent before us.

[3] We will assume, without deciding, only for the purposes of this appeal, that the material produced before the learned judge and before us discloses serious questions to be tried. The only issue before us is whether the grant of an injunction in the terms sought is barred by s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). There has been quite a lot of litigation about the Act and for that reason we will not say much about the body it created. We will go straight into s 72. That section provides:

> 72 Notwithstanding any law, an order of a court cannot be granted —
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> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under the Act;
>
> (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under the Act;
>
> (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,
>
> and any such order, if granted shall, be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

[4] It has already been decided that the section is constitutional and bars the grant of injunctions against Danaharta (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257) and that it excludes judicial review (see *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal* [2007] 5 MLJ 125). But it must be said in fairness to the appellants that their counsel has reserved the right to re-argue the constitutionality point at the appropriate stage.

[5] The question we have to decide is this. Would the grant of an injunction against the receivers and managers appointed by Danaharta offend s 72? The identical question came up before this court in the case of *Marina Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed)* [2008] 1 MLJ 317 where at p 331, the court reproduced the following passage from the judgment of the High Court:

> The defendant by encl 13 is in effect attempting to obtain indirectly an injunction against Danaharta. By stopping the receiver and manager from obtaining possession of the said building the defendant would have restrained Danaharta from its right to realise to charge over the land and building. Under s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 (Act 587) no injunctions order can be made against Danaharta or to affect its decision …

Sulaiman Daud JCA after quoting the above passage went on to say this (at p 332):

> We fully agree with the learned judge. In *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal* [2007] 5 MLJ 125, the Federal Court adopted with approval the decision in *Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* [2002] 5 MLJ 720 and *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186, which held that the court is precluded by the expressed provisions in the said s 72 from granting any injunction or other restraining orders against the corporation. Here we would add that the said prohibition also apply to a subsidiary of the corporation by virtue of s 60 of the Act.

[6] It is implicit that this court has already held in *Marina Mohd Yusoff v Pekeliling Triangle Sdn Bhd* that an injunction granted against a receiver and manager would indirectly contravene s 72 of the Act. We must adopt and apply the decision in *Marina Mohd Yusoff* because this court is bound by its own decisions: *Hendry v De Cruz* [1949] MLJ Supp 25. We have accordingly no alternative but to uphold the decision of the learned judge in this case.

[7] A sustained argument was made to us on the position of the receivers and managers. Counsel for the third respondent referred us to the following passage in the judgment of Jenkins LJ *Re B Johnson & Co (Builders) Ltd* [1955] 2 All ER 775, at p 790:

> … whereas a receiver and manager for debenture-holders is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture-holders. The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and management pending sale, and with full discretion as to the exercise and mode of exercising those powers. The primary duty of the receiver is to the debenture-holders and not to the company. He is receiver and manager of the property of the company for the debenture-holders, not manager of the company. The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. The whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.

[8] Our attention was also drawn to the decisions of the English Court of Appeal in *Gomba Holdings UK Ltd & Ors v Minories Finance Ltd & Ors*

[1989] 1 All ER 261 and *Silven Properties Ltd & Anor v Royal Bank of Scotland Plc & Ors* [2004] 4 All ER 484. In *Gomba Holdings*, Fox LJ described the agency of a receiver as follows: A

> The agency of receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor. The relationship set up by the debenture, and the appointment of the receiver, however, is not simply between the mortgagor and the receiver. It is tripartite and involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder on the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter of contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership.
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> All this is far removed from the ordinary principal and agent situation so far as the mortgagor and the receiver are concerned. Whilst the receiver is the agent of the mortgagor he is the appointee of the debenture holder and, in practical terms, has a close association with him. Moreover, he owes fiduciary duties to the debenture holder who has a right, as against the receiver, to be put in possession of all information concerning the receivership available to the receiver.

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[9] In *Silven Properties* at p 494, Lightman J, stated: F

> The character and incidents of such receivers' agency has been the subject of judicial and extra judicial consideration. Per Millet QC (as he then was) in *The Conveyancing Powers of Receivers After Liquidation* [1977] 41 Conv (NS) 83 at p 88 wrote: '… the so-called 'agency' of the [receivers] is not a true agency, but merely a formula for making the company, rather than the [mortgagee], liable for his acts …'

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And at p 495 of the judgment he went on to say:

> In the context of a relationship such at the present, which is no ordinary agency and is primarily a device to protect the mortgagee, general agency principles are of limited assistance in identifying the duties owed by the receiver to the mortgagor: see *Gomba Holdings UK Ltd v Homan* [1986] 3 All ER 94 at p 97; [1986] 1 WLR 1301 at p 1305 per Hoffman J; *Gomba Holdings UK Ltd & Ors v Minories Finance Ltd & Ors* [1989] 1 All ER 261 at p 263, [1988] 1 WLR 1231 at p 1233 per Fox LJ. The core duty of the receiver to account to the mortgagor subsists, but (for example) the mortgagor has no unrestricted right of access to receivership documents. The mortgage confers upon the mortgagee a direct and indirect means of securing a sale in order to achieve repayment of his secured debt. The mortgagee can sell as mortgagee and the mortgagee can appoint a receiver who likewise can

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A sell in the name of the mortgagor. Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property.

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[10] No doubt these cases set out the position of a receiver and manager at English common law based on the equipollent UK companies legislation. But the law in this country may not be the same because of s 192(2) of the
C Companies Act 1965. That section provides:

If its appears that any receiver or manager of the property of a company has misapplied or retained or become liable or accountable for any money or property of the company or being guilty of misfeasance or breach of trust or duty in relation to the company, the Court may on the application of any creditor or contributory
D or of the liquidator examine into the conduct of the receiver or manager and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.

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[11] The subsection obviously creates a remedy that does not exist in common law. That much is clear from a reading of the judgments of Lord Evershed MR and Jenkins LJ in *Re B Johnson & Co (Builders) Ltd.* We make
F this point because counsel for the appellants said his clients would be bereft of any remedy if the injunction sought for is not granted. That is not the case. If the receiver and manager be guilty of misconduct, then an application can be made to move the court under s 192(2) and seek the appropriate relief.

G **[12]** For the reasons already given, this appeal is dismissed. The orders of the High Court are affirmed. We direct that the deposit be paid out to the third respondent to account of its costs. A word about costs though. The first and second respondents played no part in this appeal. They merely adopted the third respondent's submission. They shall not be entitled to any
H getting-up on their bill. But they shall be entitled to have their out of pockets and profit costs. Judgment delivered in open court at the conclusion of arguments on 19 February 2008.

Appeal dismissed.

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Reported by Sally Kee